

## *A PRIMER ON RIPARIAN RIGHTS*

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I recently visited the Grand Canyon. While there, I sent the obligatory postcard back to my office. The postcard pictured the Colorado River running through the gorge and showed various side canyons feeding into the main chasm. In what I later learned was a feeble attempt at humor, I asked my examiners if they would raise as an exception to title "Rights of way for drainage tiles, ditches, feeders, and laterals." When I returned from my vacation, one of my examiners brought the postcard to me and said, "Yes, I might raise the exception you suggested, but did you consider the rights of the United States to the bed of the river, or the rights of owners to accretions?" That started me thinking about what happens when a river (or a stream) runs through it.

Water law, and the riparian rights that go with ownership of waterfront property, is a somewhat obscure area of the law that may give rise to title issues. Consider whether you have ever represented someone purchasing property along the Chicago, DesPlaines, Fox, or Kankakee rivers. Have you ever represented someone purchasing a lakefront home on Lake Michigan or on the Chain-o'-Lakes? Have you ever represented a seller whose plat of survey showed a stream as one boundary line? Is that stream now in the same place as when your client took title to the property, or has the stream meandered over the years? What happens if a course of a river is suddenly changed due to a flood? These and other issues will be addressed in this article. This discussion of riparian rights concentrates on Illinois statutory and case law.

### THE BASICS

A few definitions may be helpful:

*Accretion*: The process of gradual addition to riparian land caused by the action of the water in washing up sand, earth, gravel, or other materials.

*Alluvium*: Sand, earth, gravel, or other material, gradually deposited along the bank of a stream or river, or along the shore of a pond or lake. Also referred to as *alluvion*.<sup>1</sup>

*Avulsion*: The process of a watercourse suddenly changing its channel, or a sudden addition or loss of land caused by the action of water.

*Littoral*: Belonging to, or relating to the shore of a lake or pond. (While *littoral* is the correct technical term when talking about lakes or ponds, *riparian* is almost always used, and I will use the term *riparian* when discussing lakes and ponds, as well as rivers and streams.)

*Meander(ed) Lines*: Lines run in government surveys for the purpose of defining the curves and bends in river banks and lakeshores, and for the purpose of measuring the quantity of land adjoining the river or lake. As a general rule, a meander line does not constitute a boundary line.

*Navigable*: A body of water is navigable if the water in its natural state, or with reasonable improvements, is used or is capable of being used as a highway for commerce over which trade and travel may be conducted in the customary mode of travel on water.

*Oxbow*: A bow-shaped bend in a watercourse. An oxbow lake is a bow-shaped lake existing in the former channel of a watercourse.

*Reliction*: The process of water gradually withdrawing from one side of a stream, or withdrawing from the banks of a pond or lake.

*Riparian*: Belonging to, or relating to the bank of a river or stream.

*Thread*: When used as a boundary line, the thread of a river or stream is the middle line between the banks, irrespective of the depth of the channel.<sup>2</sup>

### DISCUSSION

#### *Rivers and Streams*

A riparian owner is one who owns land abutting a watercourse. A conveyance of land abutting a stream or river conveys the submerged land to the center thread of the watercourse. Notwithstanding this general rule, grantors may convey land to the water's edge, but only if their intention is clear that submerged land is not part of the conveyance. In addition, if a riparian owner owns land on both sides of a water-

course, then he or she owns the entire bed of the watercourse to the extent of his or her estate on either side of the watercourse.

Riparian owners have a number of rights and obligations. Among the rights are rights to accretions.<sup>3</sup> Rivers and streams change their courses over time. As a watercourse meanders, the water on the inside of a curve moves more slowly than the water on the outside of a curve. Alluvium tends to be deposited along the banks on the inside of the curve, while the bank along the outside edge of a curve tends to be eroded away. The riparian owner on the inside curve of the river gets the benefit of accretions, while the riparian owner along the outside curve loses land to erosion. As the center thread of the river shifts, the acreage of the riparian owner benefiting from accretions increases. On the other hand, the acreage of the riparian owner burdened by erosion decreases.

Unlike the slow changes brought about by accretion, the changes brought about by avulsion are sudden, often caused by flood waters. The course of a river or stream may suddenly change as flood waters rip away at banks or cut new channels across oxbows. When changes to the center thread of a river or stream occur by avulsion, the rule is that the riparian property lines remain where they were prior to the avulsion. While much more complicated than a simple act of avulsion, a nice visual representation of the result can be had by looking at a map of Illinois. Kaskaskia and the surrounding areas, though part of Illinois, are actually west of the Mississippi River. The state line between Missouri and Illinois at Kaskaskia runs along the former course of the Mississippi River.

Riparian owners also have the right to access the water and a right to use the water as it passes. One riparian owner has the same rights as another, so one riparian owner cannot exercise his or her rights to the detriment of another trying to exercise the same rights.<sup>4</sup> For example, an owner of an industry may not withdraw so much water that another industry downstream cannot operate, or unreasonably pollute the water so it cannot be used by riparian owners downstream.

On a navigable river, a riparian owner's rights and obligations are essentially the same as along a non-navigable river, with a few significant exceptions. The State of Illinois retains jurisdiction over navigable waters within its borders, subject to the powers of the United States to regulate interstate commerce. Furthermore, where waters are navigable, the public has an easement for the purposes of navigation, regardless of the ownership of the bed of the river or stream.<sup>5</sup> The rights of the public, the State, and the United States are known as a navigation servitude.

There is no simple test to determine whether a watercourse is navigable, though courts have held that some watercourses are non-navigable, and the United States Code declares some watercourses to be non-navigable.<sup>6</sup> Generally, a watercourse is navigable if, in its natural state, it is used or is capable of being used as a highway for commerce over which trade may be conducted in the customary modes of travel on water.

However, the fact that a stream is deep enough to float a boat does not itself make the water navigable. No fast rule can be formulated as to when a stream or river is navigable, and is, therefore, subject to a navigation servitude.<sup>7</sup>

### ***Lakes and Ponds***

The rights of an owner of land bounded by a lake or pond are similar to the rights of an owner of land bounded by a watercourse. Generally, a riparian owner on a *non-navigable* lake has title to the center of the lake. Where a lake or pond lies completely within a single owner's land, the entire lake belongs to that owner as appurtenant to the land. On the other hand, where several owners' lands front on a non-navigable lake or pond, those owners have title to the bed of the lake ratably.

While there can be more than one owner of a lake's bed, the Illinois Supreme Court has held, ". . . that where there are multiple owners of the bed of a private, non-navigable lake, such owners and their licensees have the right to the reasonable use and enjoyment of the surface waters of the entire lake provided they do not unduly interfere with the reasonable use of the water by other owners and their licensees."<sup>8</sup> Your clients can probably use their boat for recreational purposes, but they most likely cannot build a fence across a lake to contain their cattle.<sup>9</sup> There is a lot of gray area between these two extremes, and the factual question of "reasonable use" will necessarily require a case by case analysis.

Title to the bed of a *navigable* lake is vested in the State in trust for all the people of the state. In order to determine whether a lake is navigable, one must investigate whether the lake was navigable when the State of Illinois was admitted to the Union. If the lake was navigable for useful commerce at the time of Illinois' admission to the Union, then the title to the bed of the lake is vested in the State in trust for the people of the State. The Illinois Supreme Court has said "There is no exception to this policy, unless it be the apparent exception in cases where the government has meandered lakes or ponds and shown the same on its surveys by meandered lines, in which cases we have repeatedly held that the title to the bed of such lakes or ponds is in the State in trust for the people, and that the shore owners, whether the lake be navigable or non-navigable, take title to the water's edge, only [citations omitted]."<sup>10</sup>

Lake Michigan is the prime example in Illinois of a navigable lake. The bed of the lake is owned by the State in trust for the people of Illinois. That ownership is subject, however, to the paramount control of the United States over commerce and navigation.<sup>11</sup> Our state legislature has also codified the navigability of certain other bodies of water. 615 ILCS 5/4.9, *et seq.* At 615 ILCS 5/24, not only is the bed of Lake Michigan declared to be held in trust for the people of the State of Illinois, but also the lakes named in a 1962 Report of the Department of Public Works and Buildings. Chapter 615 contains numerous other provisions affecting various bodies of water and watercourses and should be reviewed by the real estate practitioner.

## Title Exceptions

If you have represented a client who has purchased or sold land abutting a body of water, then you probably have seen at least one exception raised on your title commitment regarding your client's rights and responsibilities with respect to that body of water. The following exceptions to title, or some variation of them, are the most common exceptions raised on a title commitment, although other exceptions specific to the parcel in question may be raised.

A title examiner will raise at least one of the following exceptions upon discovering that a parcel of land abuts a stream or river:

RIGHTS, IF ANY, OF THE UNITED STATES OF AMERICA, THE STATE OF ILLINOIS, THE MUNICIPALITY AND THE PUBLIC IN AND TO THAT PART OF THE LAND LYING WITHIN THE BED OF THE [NAME OF RIVER]; AND THE RIGHTS OF OTHER OWNERS OF LAND BORDERING ON THE RIVER IN RESPECT TO THE WATER OF SAID RIVER.

RIGHTS OF OWNERS OF LAND BORDERING ON THE [NAME OF RIVER] IN RESPECT TO THE WATER AND USE OF THE SURFACE OF SAID BODY OF WATER.

RIGHTS OF ADJOINING OWNERS TO THE UNINTERRUPTED FLOW OF ANY STREAM WHICH MAY CROSS THE PREMISES.

The first exception is raised when an abutting or passing stream or river may be navigable. We disclose to you that other land owners have certain rights to the water (e.g. right to access, the right to use the flow, etc.). We also disclose to you that the United States, the State, and the public have certain rights that affect the property. These servitudes must be shown as exceptions to title.

The second and third exceptions may be raised when the parcel abuts a non-navigable watercourse, or when a watercourse runs through a parcel. While the United States and the State of Illinois do not have servitudes in non-navigable rivers or streams, other riparian owners do have the right to use the surface of the water and the right to the flow of the watercourse.

A title examiner will raise one of the following exceptions upon discovering that a parcel of land abuts a lake or pond:

RIGHTS, IF ANY, OF THE UNITED STATES OF AMERICA, THE STATE OF ILLINOIS, THE MUNICIPALITY AND THE PUBLIC IN AND TO SO MUCH OF THE LAND, IF ANY, AS MAY HAVE BEEN FORMED BY MEANS OTHER THAN NATURAL ACCRETIONS OR MAY BE COVERED BY THE WATERS OF [NAME OF LAKE].

RIGHTS OF OWNERS OF LAND BORDERING ON [NAME OF LAKE] RELATIVE TO SAID BODY OF WATER.

The first of these exceptions is raised when a parcel abuts a navigable lake. It discloses the servitude in favor of govern-

mental entities and the public.

The second exception is raised when a parcel of land abuts a non-navigable lake. It discloses the rights of other lakeside owners to use the waters of the lake.

## CONCLUSION

This article has touched only on the basics of riparian rights. Each case will present a different fact pattern and your client's rights and obligations may be affected by more than the common rules discussed here. Look for restrictions and easements reserved in deeds, plats of subdivision, and homeowner association bylaws. Look at plats of survey—does the legal description and drawing match the parcel to be insured? Are there docks or boat launches on the parcel? Has the Army Corps of Engineers established any rules regarding the use of the riparian tract? Are there local ordinances that affect your client's riparian rights? When a question arises, call your local office counsel or underwriter, and we will work with you toward a resolution of any title issues.

## NOTES

Chicago Title Insurance Company examining manuals and other reference material are incorporated in this article without specific citation.

<sup>1</sup>*Lovington v. The County of St. Clair*, 64 Ill. 56, 58 (1872).

<sup>2</sup>The Legal Elements of Boundaries and Adjacent Properties, Ray Hamilton Skelton, p. 311 (1930).

<sup>3</sup>*Lovington v. The County of St. Clair*, 64 Ill. 56, 64 (1872).

<sup>4</sup>*Bouris v. Largent*, 94 Ill.App.2d 251, 254 (1968).

<sup>5</sup>*DuPont v. Miller*, 310 Ill. 140, 145 (1923).

<sup>6</sup>33 USC §21, *et seq.* Sections 26 and 27 discuss the non-navigability of certain portions of the Calumet and Chicago rivers. On the other hand, Chapter 615 of the Illinois Compiled Statutes legislates the navigability of certain rivers.

<sup>7</sup>*Bofman v. Material Service Corp.*, 125 Ill.App.3d 1053 (1984), and *Senko v. LaCrosse Dredging Corp.* 16 Ill.App.2d 154 (1957) for succinct statements about navigability.

<sup>8</sup>*Beacham v. Lake Zurich Property Owners Association*, 123 Ill.2d 227, 232 (1988).

<sup>9</sup>See *Statler v. Catalano*, 167 Ill.App.3d 397 (1988) and again at 293 Ill.App.3d 483 (1997) for lessons about unreasonable use.

<sup>10</sup>*Wilton v. VanHessen*, 249 Ill. 182, 189 (1911).

<sup>11</sup>*DuPont* at 145.

